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THE KING VS. AUG. C. FERNANDEZ. REPORT JUDD C. J., M'CULLY, PRESTON, BICKER

TON AND DOLE, 33. Opinion of the Court per Mr. Justice McCally.

The defendant appeals from a con-viction in the Police Court of Honoluin for keeping on his premises, in Honolulu, on the 5th of November, 1888, on King street, five gallons of spirituous liquor, to wit, of Madeira wine and beer, contrary to the provisions of Section 1 of Chapter LXVII. of the Acts of 1888, the defendant being licensed storekeeper.

The defendant admitted the facts charged, but claims that they do not constitute a criminal offense under the Constitution and Laws of the Ha-

waitan Islands. The statute is entitled "An Act to better Prevent Illicit Traffic in Spirit-

uous Liquors." Section 1 is as follows: "It shall be unlawful from and after the passage of this Act, for any person or persons conducting or carrying on any business or trade, for the carrying on of which a license is required by the Government, or for any other person except druggists, physicians and licensed dealers in spirituous liquors, to have or keep or permit on or about the premises where such business, or any portion thereof, is carried on, or where any portion of the stock used or kept for such business is stored. any spirituous liquors, except for the use of those engaged on the premises, and which shall not exceed at any time one-half gallon of wine or beer, or one quart of ardent spirits. The definition of the term spirituous liquor herein shall be the same as is

LXIV, of the Laws of 1882.1 It is strongly contended by defend-ant's counsel that the section has no sensible and consistent meaning, and that the strict reading of its clauses yields only absurdities.

It cannot be denied that the statute is so lacking in plain meaning that it requires close examination to determine what is herein enacted.

What scope and effect is to be given to the words "for any other person except," etc. ? If we make a parenthesis about the excepted matter the thing said is that no person holding a license, and no other person, shall keep or suffer to be kept on the business premises of a licensee any spiritnous liquors. Druggists, physicians and licensed dealers in spirituous liquors are excepted. They are not prohibited from keeping spirituous liquors on any licensed premises, either their own or of other persons. On the other hand, the licensee shall not permit any person to keep liquor. on his premises-druggists, etc., not excepted. The most favorable interpretation which will support the statute and conform to the supposed inthat these three excepted classes are excepted from drawing the penalty adopt the interpretation that as the of their own, it is intended that they may keep spirituous liquors on their singuitie. Neither of these interpreas the case before us does not touch anything in this exception, we may

pass by the difficulty.

The counsel for defendant contends be taken to mean that it shall be unlawful for any person except druggists, etc., to keep spirituous liquors on his premises unless it shall exceed find the difficulty in giving the second excepting clause a reasonable mean- placed under this penal police restricing. It is an appendage. If the sening. It is an appendage. If the sentence closed with a period after "any spirituous liquors" there would be a dors at wholesale and retail of im-"except [spirituous liquors] for the use of those engaged on the premies, and which [spirituous liquors] shall not exceed," etc. The words we have added in brackets are not requisite to inter-island passenger vessels, shoresupply omissions or deficiencies; what nothing else than the immediately product of this Kingdom are, with preceding subject, and the relative pronoun refers to its nearest antece-

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specified small quantity for personal use, is the Act unconstitutional? The first section is complete in itself so

things prohibited in sundry sections. What is prohibited in section first is the mere possession by licensees of page 661. spirituous liquor without intent to traffic in it. But spirituous liquors may legally be sold, and legally bought and possessed. This statute creates a new, distinct offense. The possession of liquor without selling or law for the prevention of traffic? The title of this Act does not, therefore, express the action which is made penal by it, mere possession without intent, etc. Article 77 of the Constiembrace but one object, and that shall be expressed in the title. The title of what is enacted in this law should be to prohibit the possession of liquor and illicit traffic in it. A comparison with other sections of the law will show the necessity of expressing that an act, lawful otherwise, must be done with unlawful intent in order to make it criminal. Section 2, prohibiting the forwarding of orders for liquor, another person, which is a traffic. Section 3 prohibits receiving into pos-

deliver or traffic it to third persons. And no one of the three offenses hereby established is committed without an intent to traffic which must therefore be affirmatively shown, and which admits of defence.

We may also Illustrate the difference of this law from other legislation and the specific novelty of it by com-parison with the Act of 1882, Chapter XLIV., Section 33, which has been supposed to cover somewhat similar ground. That enacts that circumstances existing which tend to show an intent to traffic, and a traffic, such as some significant sign, a fitting of a bar with its apparatus, such as to induce a reasonable belief that there is traffic and the possession of more spirituous liquor than is reasonably equired for the use of persons residing on the premises, shall be deemed orima facic evidence of unlawful sale of liquor. That is to say, that it is sufficient proof, until rebutted, without evidence of particular sales. No one is punishable without such evidences of intent to coramit illicit traffic. It is a statute rule of evi-

The law we are now considering establishes as an offense that which is not illicit traffic, under a title which is confined to illicit traffic, and does not express the new offense. It must be held, therefore, that the first section contravenes Article 77 of the Constitution, and is void for this

Counsel for the defendant contends that the section is in conflict with those articles of the Constitution which guarantee an equality of

The operation of this Act is confined to one class of the community, viz., those persons whose business or trade requires to be carried on inder a license.

It is indisputable that the police power of the State may lawfully be ontained in Section 2 of Chapter applied to restrict uses of property— when the welfare or safety of the community requires it. But it will be ound that these laws are of general and equal application. The Act of 1882, which we have cited above, applies to all persons. It is not only the holder of a store license, for instance, to whom the rule of evidence derived from circumstances which tend to show an illicit traffic is applied, but equally any other person to whom such cir-

sumstances attach themselves. The law restricting the storage of rerosene applies to all persons; so do the laws relating to gunpowder, to lynamite, giant powder, etc., the law especting nuisances and offensive or corrupt substances; and they all relate to articles and things which the public welfare, safety or health require to be guarded, restricted or sup-

In our view the term "dangerous" cannot be applied to spirituous liquors dynamite, gunpowder, benzinc, kerosene, etc., and there is a fallacy in so using it. No one will claim that the laws restricting the dealing in spirit-uous liquors are based on the danger tention of the Legislature, it being from the inflammable quality of pure presumed not to intend absurdity, is alcohol. We apply the same word of destruction of persons and buildings by explosives-but they are different things. One is subjective, the three excepted classes have premises other is objective. Whoever and whatever is within the circle of damage of a dynamite explosion is liable to be own premises, merely by applying destroyed. Spirituous liquors are to liberally the rule reddendo singula the majority of people, and to all certainly who do not choose to partake tations is quite satisfactory to us. But of them, not harmful, and not dan-

And it does not appear why the posession of spirituous liquors is dangerous to the public welfare specially that the latter part of the section must and only in the case of persons carry ing on business under a license. It will be seen by examining the list of businesses required to be licensed that there is a great variety in their charthe prescribed amount; but we do not acter, and that many are of a description not suggesting a reason for being otal prohibition. Now there is added ported goods who must be licensed, but banks, dairys, livery stables, pork butchers, sellers of salmon, sports-men [on the island of Oahu], cake peddlers, hacks and hack-drivers, boats, must be licensed. On the other 'excepted for use" can mean hand, vendors of goods the growth or few exceptions, e.g. awa, not required to take license: soda-water tands and other vendors of home-With the view that the statute cer- made non-intoxicating drinks, require tainly enacts that the holders of busi- no license, although it would seem ness licenses shall not keep spirituous | that the evil to be remedied might as | liquors on their premises except a probably be encouraged in these as in licensed businesses.

While the police power may be exercised severely within the limits far as describing and enacting a certain unlawful act. The penalty for safety, it cannot be considered lawful brackets in his brief, which is not the thority." The case of Mugler vs. this is contained in the sixth section, to make arbitrary discriminations, which, in a general way, prescribes a nor to accomplish other objects under are read without considering them as that a law which forbade anyone to

> power. Mugler vs. Kansas, 123 U. S., at People vs. Gillson, 109 N. Y., 389. In re Jacobs, 98 N. Y., 98.

The King vs. Lau Kin, lately deeided in this Court.

not intend to traffic, and in fact State except for medical, scientific never does traffic, has violated any and mechanical purposes," and the statute provided that all places where such are manufactured, sold, bartered or given away are common nuisances, etc. The prohibition is total, and to all classes. It is obvious that rulings tution requires that every law shall of the Court on such legislation do not apply to the case where the liquor is a lawful commodity, and to the pro- rule the point made upon the con- tion, although it may differ from their hibition of a certain class of the com-

munity to possess it without unlawful

intent. It was submitted in argument by defendant's counsel that a condition to the effect proposed by this section offence for storekeepers to do that administration and decision. It has might, if there were such a law, be added to licenses, with the penalty of a cancellation for breach. In view of Referring to the the forwarding of orders for liquor, applies only to orders with intent that the spirits shall be delivered to the observations made in the recent that the spirits shall be delivered to case of Wing Wo Chan vs. The Ha-for any person or persons conducting politic. Considerations of that sort waiian Government, and of The King or carrying on any business or trade, must, in general, be addressed to the vs. Lau Kiu, this seems very doubtsession spirituous liquor with intent ful; but such a case is not before us. is required by the Government, or termined there are concluded there.

the equal property-rights guaranteed by the first article of the Constitution. Upon these several considerations ve hereby pronounce Section 1 of the Act in question void.

reversed—the defendant acquitted. By virtue also of the decision in Wing Wo Chan's case the liquor seized could not be confiscated. Ashford, Attorney-General, for the Crown; A. S. Hartwell, for the defendant

March 9, 1889.

Islands-In Banco. THE KING VS. AUGUST C. FERNAN DEZ.

Appeal from the Police Court of Honolulu. Heard in vacation by con-

BEFORE JUDD, C. J., M'CULLY, PRESTON, BICK ERTON AND DOLE, J.J.

Dissenting Opinion by Mr. Justice

This is an appeal from the Police Court of Honolulu on points of law.
The defendant being a licensed storekeeper, was arrested for having on his premises in Honolulu, where he carried on his business, five gallons of spirituous liquors contrary to the provisions of Section first of "An Act to better prevent illicit traffic in spirituous liquors," passed by the Legislature of 1888.

The defendant admitted the facts charged, but defended the prosecution on the ground that they did not make a criminal offense under the laws and Constitution.

He was sentenced to pay a fine of twenty-five dollars and costs, and the spirituous liquor mentioned was confiscated.

The defendant appealed to the Supreme Court in Banco upon the fol-lowing points of law, to wit: "1. Because Section 1 of Chapter

LXVII. of the Session Laws of 1888, under which the said charge is brought, is unconstitutional and void, and particularly because the same is in conflict with the provisions of Articles 1, 6, 9, 12, 14 and 47 of the Con-

"2. Because the act charged against the defendant is not a criminal offence under the Constitution and Laws of the Hawaiian Islands.

"3. Because the judgment herein made against the defendant is contrary to the Laws and Constitution of the Hawaiian Islands, as being based upon an unconstitutional provision of the statute."

The enactment in question is as follows: "It shall be uplawful from and after the passage of this Act, for any person or persons conducting or carrying on any business or in the sense in which it belongs to trade, for the carrying on of which a license is required by the Government, or for any other person except druggists, physicians and licensed dealers in spirituous liquors, to have or keep, or permit on, or about the premises where such business or any portion thereof is carried on, or where 'danger" to the risk of acquiring an any portion of the stock used or kept injurious or evil habit, and to the lia- for such business is stored, any spiritons liquors, for the use of one-half gallon of wine or beer, or one quart of ardent spirits."

There is no question that that part of the judgment which confiscated the liquor mentioned in the pleadings must be overruled, as there is no law

neal, claims that the law above quotthat a literal construction of the words of the statute produces an absurdity; for instance,—that the words understanding of this question-it shall be unlawful for any person except druggists, etc., to have or keep, or permit on, or about the premises, any spirituous liquors, except for the use of those engaged on the premises, and which shall not exceed at any time one-half gallon of wine or beer, or one quart of ardent spirits," can only mean that it shall be unlawful for any person, except druggists, etc., to have on his premises any spirituous liquors which shall not ex seed one-half gallon of wine, etc.; in other words that no one can have less than that quantity unless he is a

druggist, physician or licensed dealer

in spirituous liquors. This is, indeed, an absurd conclusion, and if it is the law the defendant is certainly entitled to a discharge. To reach this interpretation it is necessary to consider the words, "except for the use of those engaged on the premises," as a parenthesis, and the defendant's counsel has for the elucicase in the statute. If these words Kansas, above referred to, decided penalty for the violation of any pro-vision of the Act, there being sundry are within the proper compass of this a parenthesis, the interpretation condoes not belong to them; for in-stance, it shall be unlawful for any point: "If, in the judgment of the person except druggists, etc., to have "any spirituous liquors, except | toxicating liquors for the maker's for the use of those engaged on the own use, as a beverage, would tend to liquors for the use of those engaged guard the community against the Mugler vs. Kansas, 123 U. S., has on the premises) shall not exceed at evils attending the excessive use of possession of liquor without selling or intent to sell has hitherto been lawful.

The possession without intent to traffic is not related to the offense of illicit traffic. How can it be said that Kansas provided that "the manufacture of the one that gives the statute of that question." With equal truth one who possesses spirituous liquor ture and sale of intoxicating liquors effect, rather than the one that leads it may be said that, if in the judgbeing legal goods in which he does shall be forever prohibited in this to absurdity, (Vattel's 15 and 16 Rule), "In construing penal statutes, we lation of spirituous liquors in certain must not, by defining, defeat the obvious intention of the Legislature," to interfere with, or to defeat the at-(Potter's Dwarris, 247). I have no tempt to regulate and control the difficulty in finding that the offence liquor traffic, and thereby to diminish described, is the having more than the evils resulting from an unreone-half gallon of wine or beer, or stricted use of spirituous liquors, it is one quart of ardent spirits," under the not for the courts to disregard the circumstances mentioned, and over- legislative determination of the ques-

> struction of the statute. The defendant's counsel further contends that the law, under which these "This Court can know nothing of proceedings have been taken, is un-constitutional in that it makes it an tution and the laws, and the course of which the rest of the community may no legislative powers. It cannot

gaged on the premises, and then not the year 1887, and perhaps, shows an more than the quantity limited. The advance of judicial sentiment in the words, "or for any other person," extend the application of the statute to the whole community, "except druggists, physicians and licensed dealers in spirituous liqurs," they being the The judgment of the Police Court is only persons excepted by the statute. The evident object of the Legislature in the enactment of this provision, was to prevent such places of general resort as stores and other premises used for carrying on such public pursuits as require a Government license, from being used for the illicit traffic in spirituous liquors, by forbidding the Supreme Court of the Hawaiian storage of liquors in such places either by the proprietors, or their customers or clients, or by any one, except only | the principle, for the Legislature may in a very limited quantity, "for the use of those engaged on the premises." Inasmuch as it is comparatively easy for a person carrying on a ous or dangerous to public order or business which attracts a large number of customers, to evade the law against the unlicensed traffic in liquors, under the fiction of storing like all other social and conventional liquor belonging to his customers, as rights, are subject to such reasonable well as in other convenient ways, the limitations in their enjoyment as Legislature may well have considered that the success of the law requires that its provisions should include the whole community. There-fore the only inequality of the law is the exclusion of druggists, physicians and licensed liquor dealers from its provisions, but as they are authorized to sell spirituous liquors in connection with their respective pursuits by the the state, persons and property are general "Act to regulate the sale of subjected to all kinds of restraints spirituous liquors," and for perfectly obvious reasons, we need not consider this point further. Even considering the law in its application to bear mainly upon persons conducting some licensed business or occupation, it is not for that reason unconstitutional, 'Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application; they may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors,

or married women, bankers or traders and the like," (Iowa R. R. Land Co. vs. Soper, 39 Iowa 112, and Cooley's Const. Lim. 482). The point is also made by defendant's counsel, that the provision of law in question is unconstitutional because liquor is property, and to make its mere possession criminal, would divest it of its property character. This would be true if the law forbade all possession of liquor, inasmuch as its purchase is legally pro-vided for. But under the police power of the state, may not the possession of liquor be fenced about with precautions in order to diminish the vils arising from an illicit traffic? The power of the Legislature to limit the right of property in liquor as well as in other things, the possession of which is liable to abuse or to be productive of injury to society, is generally recognized. The provisions of a former liquor law in this country, making it a penal offence to give liquor to a native Hawaiian, was a limitation of the right of property in liquor; the law compelling the erec-tion of none but fire-proof buildings within certain limits, is a limitation of the right of property in land; the law forbidding the storage of more those engaged on the premises, and than ten cases of kerosene in one which shall not exceed at any time place, is also a limitation of the right of property. "It belongs to that de-partment (legislative) to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the pubthat authorized the forfeiture of liquor so unlawfoldly held.

The defendant's counsel, in his apregulations is the public interest, ed is unconstitutional, and he argues and the Legislature is the judge of this. Because the Legislature has legalized the sale of spirituous liquors, it is not thereby, restricted to quote only those necessary to an from limiting, controlling and regulating the use of such liquors in the hands of purchasers as it shall deem advisable for public order or public morals. The power of the state to prohibit the sale of spiritnous liquors, is unquestioned: this includes the lesser power of regulating the use and possession of liquor when the sale is legalized. We see an instance of this power of regulating the use of articles that may be legally possessed, in the restriction of the use of giant powder, which may be legally bought and sold and held in possession, and yet the use of it for taking fish is made a penal offence by law. Judge Grier of the Supreme Court of the United States, said in his concurring decision of the License Cases reported in 16 Curtis, 577: "The police power, which is exclusively in the States, is alone competent to the correction of these great evils, (resulting from intemperance) and all measures of restraint or prohibition necessary to effect the purmanufacture liquor for his own use was constitutional. The Court use Legislature, the manufacture of inpremises and which (referring to the cripple, if it did not defeat the effort to at all, ment of the legislature, the accumu-

own views as to what is necessary or amend or modify any legislative acts.

for the carrying on of which a license | Legislature. Questions of policy deto sell, transfer or dispose of it to others. Section 4 requires that the shipment without labels, which is shipment without labels, which is prohibited, shall be with intent to sider that this is in contravention of liquor except for the use of those en-

questions raised in its adjudication; 1-51, the following statement of law by that Court: "We have no doubt that it is competent for the Legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious." To include liquors in this category is not a forced application of reasonably decide that the possession of liquors in certain localities and in unlimited quantities would be injuripublic morals; and if they so decide, it is not for the courts to dispute their conclusions," "Rights of property shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the Legislature, under the governing by the Constitution, may think necessary and expedient." (Shaw, Ch. J. in Commonwealth vs. Alger, 7 Cush.

By this "general police power of

and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the Legislature to do which, no question ever was, or, upon acknowledged principles, ever can be made, so far as natural persons are concerned." (Redfield, Ch. J. in Thorpe vs. Rutland and Burlington R. R. Co., 27 Vt., 140). "A regulation, whatever may be its character, which is instituted for the purpose of preventing injury to the public, and which does tend to furnish the desired protection, is clearly constitutional." (Tiedman's clearly constitutional." (Tiedman's Limitations of the Police Power, 207). And quoting from Judd, J. in the case of the King vs. Tong Lee, 4 Haw. 341-2, otherwise known as the Chinese Wash-houses Case: "Says Cooley on Constitutional Limitations, 577 the limit to the exercise of the police power in these cases must be this the regulations must have reference to the comfort, safety or welfare of society.' The Act in question does purport to have reference to the comfort, safety and welfare of society. Its object, however injudiciously expressed, is plainly to repress what, in the opinion of the Legislature tends to the dissemination and propagation of disease. We are unable to see that the Act in question violates this provision of the Constitution, as no property of the citizens is appropriated by the state, or destroyed without due process of law. * judiciary is not vested with the authority to decide whether laws en-acted by the Legislature are politic, wise or reasonable." It may with equal correctness be said of the legislative regulation which this Court is asked to set aside, that it "does purort to have reference to the comfor safety and welfare of society, and that its object, however injudiciously expressed, is plainly to repress what, in the opinion of the Legislature," creates both an opportunity and a temptation to unlawfully traffic in spirituous liquors, and therefore tends to such traffic. It needs no argument to demonstrate that the unlimited accumulation of liquors in stores and offices frequented by the public, and where the public may lawfully go, would, in itself, tend to a traffic in such liquors, and so be a menace to the public welfare. There is little force in the argument that the accumulation of liquor in certain places may not be prevented by law, as the accumulation of gunpowder or burning fluids is prevented, because it is not an explosive or a dangerous combustible. Such accumulation may be prevented if it menaces society in any way; the Legislature thinks it tends to illicit traffic in liquor; if this Court doubts the correctness of the legislative conclusion, it may not for that reason interfere, if we accept the foregoing authorities. I think that I have covered, in these conclusions, substantially all of the points raised by the defendant's counsel in his argument.

The notice of appeal specifies Arti-cles VI., IX., XII. and XIV. of the Constitution as being in conflict with the law under consideration; these are not in conflict with Section first of the "Act to better prevent illieit traffic in spirituous liquors," and the defendant's counsel does not claim, in his argument, that there is such conflict; he does indeed argue against the right of seizure of liquors held against the provisions of Section first of the said Act, but that Section does not provide for the seizure of such liquors, and Section 5th, which does provide for such seizure, has been declared void by the decision in Wing Wo Chan & Company vs. Hawaiian Government: moreover there is nothing in the record to show that the liquors in question had been seized

It therefore seems to me that the judgment appealed from should be affirmed as to the fine and costs, but that that portion of it which decrees the forfeiture of the spirituous liquers mentioned in the complaint, should

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